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ROBERT [redacted],
Plaintiff in Error,

vs.

ELLEN [redacted],
Defendant in Error.

In Error to the United States Circuit Court of Appeals for the Eighth Circuit.

BRIEF OF DEFENDANTS IN ERROR.

WILLARD KELLER,
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(13,819.)

In the Supreme Court of the United States.

OCTOBER TERM, 1902.

No. 192.

ROBERT R. WRIGHT, JR., AS MAYOR OF THE CITY OF DENVER, PLAINTIFF IN ERROR,

vs.

ELLEN TERESA MORGAN, ET AL., DEFENDANTS IN ERROR.

In Error to the United States Circuit Court of Appeals for the Eighth Circuit.

BRIEF OF DEFENDANTS IN ERROR.

STATEMENT.

A connected and chronological statement of the facts involved will render the questions presented upon this writ of error easy of solution.

In the year 1863 Joseph P. Machebeuf, who was then Catholic bishop, purchased from John I. Walley the northeast quarter of the southeast quarter of section 2, township 4 south, range 68 west, paying therefor the sum of two hundred dollars ($200). The land was conveyed to him and he immediately went into possession thereof, which possession was maintained until a conveyance to Morgan, hereinafter described, in the year 1887.

From the time of said purchase until shortly prior to the year 1887, the said piece of land was used by the members of the Catholic church as a burial place.

On May 21, 1872, the Congress of the United States passed an act entitled "An act to enable the City of Denver to purchase certain lands in Colorado for cemetery purposes." This act provided in substance that the Mayor of the City of Denver was authorized to enter at the minimum price per acre certain lands, including, among others, the tract first herein above described, to be held and used as a burial place for the said city and vicinity. (Folio 12.)

On November 15, 1873, a United States patent was issued, conveying to Joseph E. Bates, Mayor, in trust for the City of Denver, the tract of land first herein above described, with other land. This patent recited that full payment therefor had been made by the said Bates, Mayor, in trust for the City of Denver, according to the provisions of the act of Congress of April 24, 1820. Said patent granted the lands unto the said Bates, Mayor, in trust for said city, to have and to hold the same unto the said Bates, Mayor, in trust for the City of Denver, and to his successors and assigns forever. (Folio 13.)

Immediately after the obtaining of said patent the said Machebeuf, Catholic bishop, filed a petition with the Mayor and common council of the City of Denver, setting forth the fact of his purchase of the property above described and of his possession and use thereof as a burial place for the members of the Catholic church; setting forth, further, that he understood the City of Denver had obtained a patent covering the property, and praying that a deed might be made conveying the fee thereof to himself. (Folio 14.)

On December 4, 1873, within nineteen days after the issuance of the patent aforesaid, a committee of the council, which had been appointed for that purpose, reported upon said petition of Machebeuf to the effect that the petitioner had rights prior to those of the city, and the committee recommended that the prayer of the petition be granted and that the Mayor, on behalf of the city, be authorized to make a deed thereof, upon the payment into the city treasury of the cost of the land and the actual expenses which the City of Denver had been to in obtaining government title. (Folio 15.)

On January 8, 1874, less than sixty days after the date of the patent, the committee on public grounds and buildings reported that they had examined the said petition and recommended that the prayer thereof be granted. (Folio 15.) A vote was taken, on motion to adopt the report, and the same was adopted by a vote of eight in the affirmative and three in the negative. (Folio 40.) Thereupon, on the 6th day of February, 1874, and less than ninety days after the issuance of said patent, a deed was executed, purporting to be between the City of Den-

ver, by Francis M. Case, its Mayor, and the Right Reverend Joseph P. Machebeuf, bishop of Colorado, reciting a consideration of fifty dollars ($50), the receipt of which was acknowledged, and conveying unto the party of the second part, his heirs and assigns forever, the tract of land first herein above described. The deed recited that it was made by order of the city council of the City of Denver, and the habendum clause was to the party of the second part, his heirs and assigns forever. The deed was signed: "The City of Denver (Seal), by Francis M. Case, Mayor of Denver," bore the imprint of the city seal, and was acknowledged by Francis M. Case, Mayor of the City of Denver, to the effect "that he signed, sealed and delivered the said instrument of writing as his free and voluntary act, for the uses and purposes therein set forth." (Folio 16.)

At the time of these transactions the charter of the City of Denver provided, among other things, that the inhabitants of the said city, by the name and style aforesaid, through and by the city council, should have power and authority to purchase, hold, possess and enjoy both real and personal property for city hall, jail, public grounds and for other public purposes, and should have power and authority to sell and convey the same, and might also, for the use of the inhabitants of the said city, purchase, hold, possess and enjoy real property beyond the limits of said city for burying grounds and cemeteries, and improve the same; and the charter provided, further, that the inhabitants of said city, by the name and style aforesaid, should have power and authority, and they were thereby empowered and authorized, to take,

hold, possess, use and enjoy both real and personal property by deed, grant, gift, bequest, devise or otherwise, and that they should have the power, through and by the city council, to sell and convey the same for the sole use and benefit of the inhabitants of said city. (Folio 17.)

The aforesaid deed to Machebeuf was forthwith delivered and by him recorded on the following day, to wit: February 7, 1874, in the records of Arapahoe county. Machebeuf was then in possession of the property, had been since 1863 and continued in such possession until 1887. During all this period the said tract was used as a place of burial for members of the Catholic church, until just prior to the year 1887. All such burials, however, were made in the north half of said tract, so that the south half of the northeast quarter was entirely free from graves. About the year 1887 the City of Denver had grown to such an extent that the residence portion thereof was in immediate proximity to this place of burial, and the subject of burials in that place become a matter of public discussion in the newspapers and elsewhere; the newspapers and others interested in the welfare of the city insisting that burials in that place should be discontinued, and they were discontinued, and subsequently but prior to this action, by resolution of the board of health, a department of the city council, burials in said ground were prohibited. Said resolution was passed in the month of August, 1892. In the spring of 1887, and after the cessation of burials in this tract of ground, as aforesaid, one Samuel B. Morgan purchased from Machebeuf the south half of the tract, being that portion in which, as we have pointed

out above, no burials had ever occurred, and being the property now in controversy. On April 25, 1887, Machebeuf conveyed the said south half of the northeast quarter to Morgan, by a good and sufficient conveyance.

It is alleged in the amended answer that Morgan paid therefor a consideration of twenty thousand dollars ($20,000). As a further assurance of title, on May 2, 1887, the Colorado Catholic Loan and Trust Association made a further conveyance of said property to Morgan, at the instance of Machebeuf, and in view of the fact that at some time prior Machebeuf had made a conveyance of some sort to the said Loan and Trust Association. It is alleged in the amended answer that immediately thereupon Morgan took possession of all of said tract. There is no denial that immediately thereafter he proceeded to have the tract surveyed, laid it out into lots and blocks, streets and alleys, platting it under the name of Morgan's Capitol Hill Subdivision, and that on June 10, 1887, he filed the plat thereof with the county clerk and recorder of Arapahoe county, dedicating the streets and alleys of said subdivision to the public, all in full accord with the laws in such cases made and provided. The charter of the City of Denver provided that whenever any tract of land adjoining the City of Denver should be laid off into town lots, platted and duly recorded, as may be required by law, the same shall be annexed to and become a part of the City of Denver (folio 17).

Immediately thereafter the said Morgan proceeded to sell and convey portions of said tract, by the lot numbers designated upon said plat, to a large num-

ber of different parties who are named as defendants in this suit.

It is alleged in the amended answer that Morgan paid the taxes upon the said south half of the northeast quarter for the years 1888, 1889, 1890 and 1891, and that no taxes were assessed thereon for the year 1892. It is further alleged in said answer that the amount of said taxes was, in round numbers, twenty-five hundred dollars ($2,500), and included taxes levied at the instance of the City of Denver for city purposes. It further appears that neither the purchase price paid to the City of Denver by Machebeuf upon the conveyance to him, nor the taxes collected from Morgan, have ever been paid or tendered back by the city.

On January 25, 1890, and after the happening of all the events herein above receited, the Congress of the United States passed an act entitled "An act to amend an act to enable the City of Denver to purchase certain lands for cemetery purposes." This act of Congress called attention to a misdescription contained in the original act of May 21, 1872, and corrected the same. This misdescription, however, referred to a tract of land wholly distinct from that involved in this action. It was recited in this act that the City of Denver had paid for and received a patent for the land involved in this controversy, and other land, and as to the other land the former act was amended to accord with the facts and the patent theretofore issued was, by the act of 1890, approved and confirmed. It was further provided in said act "that the said City of Denver be, and it is hereby, authorized to vacate the use of the said land or any portion

thereof as a cemetery, and to appropriate the use of the same for a public park or grounds and to no other purpose" (folio 18).

On September 1, 1892, almost nineteen years after the date of the issuance of said patent and the deeding of said tract to Machebeuf, the present action was instituted by Platt Rogers, as Mayor of the City of Denver, and the City of Denver, as plaintiffs, against Samuel B. Morgan, as grantee of Machebeuf, and various other parties who held under Morgan. The action was in ejectment to recover the possession of the south half of the northeast quarter of the southeast quarter of section 2, township 4 south, range 68 west, being the tract theretofore conveyed to Morgan by Machebeuf and being the south half of the tract originally purchased by Machebeuf from Walley and conveyed to Machebeuf by the deed hereinbefore mentioned, and being that portion of the entire tract which had never been occupied with graves. Neither the City of Denver nor the Mayor thereof had ever at any time been in possession of said tract.

On January 5, 1893, the action was dismissed as to the City of Denver, by its attorneys, and the suit was thereafter prosecuted by the Mayor alone.

After much skirmishing and one trial before the Circuit Court, the defendant, Samuel B. Morgan, filed an amended verified answer on January 14, 1896 (folios 12 to 21). By stipulation it was agreed that this answer should stand as the answer for all the defendants. Later on, the said Morgan having died, it was stipulated that his heirs, Ellen Teresa Morgan et al., should be substituted and that the answer should stand as their answer as well as the answer of the

other defendants. To this answer the plaintiffs demurred upon the ground that it did not state sufficient facts to constitute a defense, and the trial court sustained the demurrer, defendants stood by their answer and judgment was rendered for the plaintiffs. Thereupon a writ of error was sued out from the Circuit Court of Appeals for the Eighth circuit, and the judgment reversed and remanded for further proceedings. The opinion of the Circuit Court of Appeals upon the reversal of said judgment will be found in 79 Federal Reporter, at page 577. The Circuit Court of Appeals held: 1. That the act of Congress of May 21, 1872, did not operate to annex any condition to the grant. 2. That the patent conveyed the land absolutely in fee and without mention of any use whatever. 3. That the act of Congress of June 25, 1890, operated to confirm and approve the said patent and beyond that had no effect upon the tract of land in controversy or the title thereto, and did not and could not annex any condition to the title or limit the use to which the land might be devoted. 4. That the patent conveyed to and vested the legal title in the City of Denver as a municipal corporation and not in Joseph E. Bates, Mayor, ~~and~~ his successors, for the reason that the grant to Bates raised a merely passive trust which was executed by the Statute of Uses. 5. That if the allegations of the answer were true the title to the land passed by the deed of the city to Machebeuf and from Machebeuf by deed to Morgan. A writ of error was sued out from this court to reverse said judgment, but was dismissed for lack of jurisdiction.

173 U. S., 702.

On remittitur from the Circuit Court of Appeals the Circuit Court, on May 15, 1899, overruled the demurrer to the answer and required plaintiff to reply in fifteen days. Johnson, then Mayor of Denver, was substituted for Platt Rogers and filed a replication. On June 20, 1899, plaintiff filed an amended replication upon which the trial was had and which will be found at folios 29 to 31. The defendants demurred to this amended replication, but the demurrer was overruled. On November 28, 1899, the case was tried to a jury and upon the conclusion thereof the jury was instructed to find for the plaintiff and a verdict was returned and judgment rendered accordingly (folios 33 and 34).

A writ of error was sued out and the cause again taken to the Circuit Court of Appeals. By the bill of exceptions it appears that the plaintiff was permitted to introduce in evidence a certified copy of the patent, although the same has been admitted in the amended answer (folio 38). Upon the introduction of the patent plaintiff's case was rested and the defendants moved the court to instruct the jury to find the issues for the defendants. The motion was denied and an exception taken (folio 39).

The defendants, on their behalf, then offered in evidence the deed from the city to Machebeuf, set forth in defendant's answer at folios 15 and 16. This deed was objected to for the following reasons: 1. Because, under the act of May 21, 1872, neither the City of Denver or its Mayor had any power or authority to convey these lands. 2. Because no ordinance or resolution of the city council of the City of Denver was shown authorizing said conveyance. 3. Because the

supposed deed did not conform to the recommendation of the committee to which the matter was sent and whose report was adopted (folio 39). The objection was sustained.

Thereupon the defendants offered the other deeds referred to in the answer and showing the chain of title to Morgan and his grantees. All of these were rejected for the reason that no title was shown in the respective grantors. The defendants thereupon renewed their motion that the court instruct the jury to find for the defendants, which motion was again denied (folio 42), and thereupon, at the request of the plaintiff, the court instructed the jury to find for the plaintiff, which was accordingly done (folio 43).

The opinion of the Circuit Court of Appeals upon its second review of the case will be found in 106 Federal Reporter, at page 453, and also in the record of this cause at folios 52 to 60.

While the case was in the Circuit Court of Appeals, Robert R. Wright, Jr., the present Mayor of the City of Denver, was substituted for Henry V. Johnson (folios 60, 61 and 62). The judgment of the Circuit Court of Appeals upon the second review of the case was that the judgment of the court below be reversed, that the defendants recover their costs, and that the case be remanded with directions to the court below to enter a judgment in favor of the defendants (folio 60).

To reverse this judgment, Robert R. Wright, Jr., as Mayor of the City of Denver, sued out the present writ of error (folios 63, 66 and 69), and the sole party now complaining of the judgment is said Robert R. Wright, Jr., as Mayor of the City of Denver.

The facts above recited are undenied and undeniable. From them it appears that nearly thirty years have elapsed since the issuance of United States patent and since conveyance of the land in controversy to Machebeuf, and nearly eleven years have elapsed since the beginning of this litigation. This cause has been three times tried in the Circuit Court; has been twice before the Circuit Court of Appeals for the Eighth circuit, and was very fully considered upon each occasion, and this is its second appearance in the Supreme Court of the United States. As was said by the Circuit Court of Appeals upon the last occasion when the cause was considered by that court:

> "This cause has now been twice before this court and we have given all phases of it our most serious attention and consideration, and the conclusions reached and settled by our deliberate judgment upon the two writs of error are that the City of Denver had the power to convey the land in controversy to Machebeuf, and that it did so. * * * The controversy has been pending between the parties for nine years, and during that time all the substantial and meritorious questions of difference between them have been settled. It would avail nothing to pursue the litigation further."
>
> 106 Federal Reporter, 458 and 459.

We submit that under the circumstances this court will not be curious to search the record for technicalities upon which to reverse the present judgment.

ARGUMENT.

I.

THE PLAINTIFF IN ERROR HAS NEITHER THE LEGAL TITLE NOR THE RIGHT OF POSSESSION.

This is an action in ejectment. The doctrine is well established that in such an action the plaintiff seeking to recover possession of land occupied by another must recover upon the strength of his own title rather than upon the weakness of his adversary's, and the burden rests upon the plaintiff to prove the title he asserts.

> "In order to recover in an ejectment suit it has long been the settled law of the federal courts that plaintiff must show a good legal title in himself and must recover, if at all, upon the strength of his own title and not upon the weakness of that of his adversary."
>
> City vs. Bigelow, 98 Fed., 242.

> "It has been long and well established as a rule of law and equity that a party must recover on the strength of his own title and not on the weakness of his adversary's title."
>
> Watts vs. Lindsey, 7 Wheaton, 161.

It is also well settled in the federal courts that the plaintiff in an action in ejectment must be clothed with a legal title to the lands in question. This rule is strictly observed and ejectment can not in the federal

courts be supported by reason of any equitable consideration.

In Sheirburn vs. Cordova, 24 Howard, 425, it was held that notwithstanding the statutes of a state making different requirements, ejectment or trespass to try title to real estate could be maintained in the United States courts only on a strict legal title.

To the same effect are:

Fenn vs. Holme, 24 Howard, 481.
Foster vs. Mora, 98 U. S., 425.
Bagnell vs. Broderich, 13 Peters, 436.
Miller vs. Courtenay, 152 U. S., 172.
Langdon vs. Sherwood, 124 U. S., 74.
Johnson vs. Christian, 128 U. S., 374.
Carter vs. Ruddy, 166 U. S., 93.

These rules being applicable, the plaintiff in error in this court can not prevail, nor can the judgment be reversed, unless such plaintiff in error be invested with the legal title, and by reason thereof be entitled to the possession of the tract in controversy.

It is important to observe that the sole plaintiff in error, and the only party now complaining of the action of the court below in any respect, is Robert R. Wright, as Mayor of the City of Denver. Suit was originally brought in the name of Rogers, the then Mayor of Denver, and the City of Denver. But four months thereafter plaintiffs' counsel dismissed as to the city, and thereafter the suit was prosecuted by the Mayor alone. Therefore, this court is not called upon, nor is it at liberty, to consider the rights of the City of Denver as a municipal corporation, but only those of its Mayor, in his official capacity.

Unless in that capacity he be invested with the legal title, and thereby with the right to the possession of the land in controversy, the judgment below can not be reversed, even though it appears that the defendants in error are likewise not invested with the legal title, for the reason that defendants in error are in possession, and no one can deprive them of that possession except by showing a better legal title.

Neither can the present plaintiff in error succeed in reversing the judgment below because of any errors committed to the prejudice of any other person or corporation, once a party to the suit. A judgment will not be reversed except for errors prejudicial to the party complaining thereof.

Neither will a judgment, however erroneous, be reversed at the instance of one having neither the title nor the right to the possession. As was said in Chittendon vs. Brewster, 2 Wall., 196:

> "But here the complainants only have appealed, and the rule is settled in the appellate court that a party not appealing can not take advantage of an error in the decree committed against himself, and also that the party appealing can not allege error in the decree against the party not appealing."

In Case vs. Kelly, 133 U. S., 21, at 29, Mr. Justice Miller employed language directly applicable to the case at bar, saying:

> "We are urged to consider that, if this decree is affirmed, dismissing the appeal of the railroad company, the defendants will be

left in the possession of property fraudulently acquired, of considerable value, for which they gave no consideration. The answer to this is that such question can not be raised by the plaintiff in this case because, having no right to take the property, it is not injured by a decree of the court which fails to grant such right. The other questions must be between the defendants in this case and those from whom they took deeds of conveyance, or such other parties, public or private, as may show that they have an interest in the controversy."

In Smelting Company vs. Kemp, 104 U. S., 636, which was an action in ejectment, wherein one of the parties claimed that the tract in controversy had been erroneously patented to the other, Mr. Justice Field held that, nevertheless, the patent conveyed the legal title, and that the matters relied upon by the contestant of the patent were not available in a suit at law, saying, at page 647:

"He must resort to a court of equity for relief, and even there his complaint can not be heard unless he connect himself with the original source of title, so as to be able to aver that his rights are injuriously affected by the circumstances of the patent, and he must possess such equities as will control the legal title in the patentee's hands. It does not lie in the mouth of a stranger to the title to complain of the act of the government with respect to it. If the government is dis-

satisfied it can, on its own account, authorize proceedings to vacate the patent or limit its operation."

But the Circuit Court of Appeals, when this cause was first before it for consideration, determined that the Mayor of the City of Denver had neither the legal title nor the right to the possession, nor any other interest whatsoever in the property in controversy, for the reason that the patent to the Mayor of the City of Denver, in trust for said city, imposed upon said Mayor no active duties whatever, and that, therefore, by the application of the statute of uses, which was held to be in force in the state of Colorado, both the legal title and the right to the possession immediately vested in the *cestui que trust*.

Morgan vs. Rogers, 79 Fed., 577, at 580.

And in so ruling the Circuit Court of Appeals was clearly right. The statute of uses (27 Henry VIII., chapter 10) is in force in the state of Colorado, and it has been so determined by the appellate court of that state.

Mills' Annotated Statutes, volume 2, section 4184.

Teller vs. Hill, — Colo. App., —; 72 Pac. Rep., 811 (decided June 8, 1903).

A drier and less active trust than that imposed by the terms of the conveyance to the Mayor could not readily be imagined. Not only does the instrument fail to require of the trustee the performance of any active duties, which necessitate the retention in him

of either the legal title or the possession, but it fails to require the performance of any duties of any nature whatsoever. (Folio 13.)

It has been held that the presumption is in favor of a use and against a trust, and that the use is executed, unless the application of the statute is repugnant to the manifest intent of the grantor.

> Newhall vs. Wheeler, 7 Mass., 189, at 198.
> Webster vs. Cooper, 14 Howard, 488, at 499.

Indeed, the correctness of the ruling of the Circuit Court of Appeals in this respect does not seem to be seriously challenged in this court by the plaintiff in error. The entire argument upon this branch of the case is found on pages 19 to 22 of his brief, occupying less than three pages of the thirty-six which make up the brief, and counsel close their discussion of this branch with the observation that:

> "Even if we are in error in our position with respect to the operation of the statute of uses, and it should be held that the title to the lands did pass to the municipal corporation, still and in that event the municipal corporation would take the land as a public trust for the exclusive use of the public, and not in its private and individual character."

Evidently counsel failed to recognize the fact that, even if it be true that the City of Denver took the title in trust (a position which we at all times combat and will presently discuss at greater length), yet if the city took the title at all, whether in trust or

otherwise, the present plaintiff in error has no interest in the property, and can not complain of any decisions of the court below or obtain a reversal of the judgment, even though it is shown to be erroneous to the last decree. All the remaining portion of counsel's brief, except the three pages above mentioned, is devoted to a discussion of the case upon the theory that the title was in the City of Denver, a position utterly destructive of plaintiff in error's right to maintain the present writ.

It is argued that the Mayor was invested with an active trust because of the words employed in the act of 1872:

> "To be held and used as a burial place for said city and vicinity."

We at all times deny that any trust whatever was created, and maintain that the patent conveyed a fee simple title, free from all conditions and trusts whatsoever, and this matter we shall hereinafter discuss; but, even if these words had imposed a trust, the language was not such as to impose any active duties upon the Mayor. He was not required to take any active steps or to do any particular thing in respect to the use of said tract of land, nor, indeed, could he, because, as had been averred by plaintiff in his complaint, the right to occupy and possess said lands had been at all times since the patent in the city. (Folio 3.)

By an active trust, such as will avoid the operation of the statute of uses, is meant such a trust as, by the terms of the instrument creating it, requires the performance of specific acts mentioned in said

instrument. If we adopt the construction of plaintiff in error, the most that can be said is that the property was conveyed with a charge thereon that it be used as a cemetery, and the rule is well settled that where a trust consists of realty a charge upon it of legacies or debts, or of any other nature, will not vest the legal estate in the trustees unless the instrument creating the trust contains some direction to them to raise money for the payment of the charge, or unless it contains some requirement to execute an active trust.

2 Leach on Trusts and Trustees, page 926, section 398.

In many cases where the trust instrument was much more definite in respect to the active duties to be performed by the trustee than in the case at bar, even adopting the position of plaintiff in error, it has been held that the statute applied and the legal title with the right to the possession vested in the *cestui que trust.*

In O'Meiia vs. Mullarky, 124 Ill., 506, a deed conveyed land to the trustee in trust for the heirs of a certain person, the title to vest absolutely in fee simple in said heirs at and after the death of the uncle of said heirs; "but to so vest upon, and only upon, the express condition that the said uncle shall, during the whole remaining term of his natural life, have a home upon said lands and a good and sufficient support therefrom, and also the control and management thereof." Notwithstanding the requirements as to the manner in which the estate should be used, it was held that the statute of uses applied and that the legal title vested in the *cestui que trust.*

In Burke vs. Valentine, 52 Barb., 412, a testator directed by his will that a certain portion of his estate should remain in the hands of his executors, or under their control for the use of his wife and children while under age, and that after the youngest child should arrive at the age of twenty-one the same should be divided among his children, share and share alike. It was held that no legal title remained in the trustees, but that it passed directly to the wife and children.

To the same effect are:

Ramsay vs. de Remer, 65 Hun., 212; 20 N. Y. Sup., 143.

Reeves vs. Bratcn, 36 S. C., 38; 15 S. E., 658.

Robinson vs. Austindorf, 38 S. C., 66; 16 S. E., 371.

Hannig vs. Mueller, 82 Wis., 235; 52 N. W., 98.

Everts vs. Everts, 80 Mich., 222; 45 N. W., 88.

The fact that the possession and the right to the possession immediately vested in the City of Denver (as is alleged in the complaint, folio 3) is sufficient to show that whatever legal title passed by the patent likewise vested in the city; for without the possession, or right to the possession, the Mayor could in no wise control the use to which the property was put.

Wainright vs. Lowe, 132 N. Y., 313.

"If the trust is a simple or passive one, to allow the beneficiary to keep and enjoy the

estate, the trustee has no power or duty to perform."

2 Perry on Trusts (3d Ed.), section 475.

Even if we adopt plaintiff in error's position and import into the patent the language of the act of 1872, as construed by plaintiff in error, the patent would read that the lands were conveyed "to the Mayor for the use of the City of Denver for the use of the inhabitants of said city and vicinity as a burial place."

In that event we should have a use limited upon a use. The statute would execute the first use, thus reposing the trust, if any, in the City of Denver, and we should have a case such as Lord Hardwick referred to when he said:

> "A statute introduced in a solemn and pompous manner has had no other effect than to add, at most, three words to a conveyance."
>
> Hopkins vs. Hopkins, 1 Atk., 591.
>
> Croxall vs. Shererd, 5 Wall., 268, at 282.

In that event, even though it were an active trust, the City of Denver, as a municipality, would be the trustee, and the Mayor of said city in his official capacity, and especially the present Mayor, successor to the original grantee after an interval of thirty years, would be a stranger to the title.

But the plaintiff in error contends that the legal title could not have vested in the city for three rea-

sons. We shall discuss these reasons in the order in which they are advanced in the brief.

It is first maintained that, because the act of 1872 stated that the land was conveyed to be held and used as a burial place for said city and vicinity, therefore a trust was established, not only for the inhabitants of Denver, but also for those living in the vicinity thereof, and that the city itself could not serve as trustee of such a trust for the reason that a municipal corporation can not serve as trustee in purely private trusts. Our reply to this contention is that the language herein above quoted from the act of 1872 did not and was not intended by Congress either to create any trust or add any condition to the grant. It was a mere statement of the motive which actuated Congress in giving the somewhat unusual authority conferred by said act, and it was so understood by the officers of the land department, for, in issuing the patent, they did not insert therein said language, or any part thereof, the patent being to the Mayor of the City of Denver, in trust for said city, without mention of cemetery or other purpose, and without stating that the land was to be used by the inhabitants of said city or by those living in the vicinity thereof, or by either or both. We submit that the officers of the land department were clearly correct in the construction which they placed upon the act of 1872, and that the patent issued was precisely such as the act contemplated. But if both the officers of the land department, the Circuit Court of Appeals and ourselves are mistaken in this view, nevertheless, it must be conceded that the patent issued conveyed the legal title, in the manner, to the extent and to the persons

named in said patent. If, by mistake or inadvertence upon the part of the officers of the land department, the land was conveyed to one person when it should have been conveyed to another, or was conveyed to one person when it should have been conveyed to that person and another, nevertheless the legal title passed thereby to the grantee and the patent is and was exempt from attack in an action of ejectment on that account. If the rights of any one were prejudiced by such a patent, or if the patent conveyed lands in fraud of the United States, the remedy lies in a direct proceeding, either by the United States or by the party to whom the title should have gone.

A patent carries the fee and is the best title known to a court of law.

This proposition is sustained by an unbroken current of authority:

Bernier vs. Bernier, 147 U. S., 242.

Cowell vs. Springs Co., 100 U. S., 55.

Smelting Company vs. Kemp, 104 U. S., 636.

Hooper vs. Scheimer, 23 Howard, 235.

Johnson vs, Towsley, 13 Wall., 72.

Gibson vs. Chouteau, 13 Wall., 92.

But, even if the officers of the land department exceeded their authority in conveying the land without mention of the purpose to which it was to be devoted and without stating that it was intended not only for the inhabitants of the City of Denver, but also for the inhabitants of the vicinity thereof, yet their act in so doing was subsequently fully ratified

and confirmed, and the time is now long passed for the raising of any such question.

The title of the act of 1872 indicated the purpose of Congress to enable the City of Denver to purchase said lands. (Folio 12.)

On January 25, 1890, the Congress of the United States, for the purpose of correcting a misdescription in the original act, passed an act entitled "An act to amend an act to enable the City of Denver to purchase certain land for cemetery purposes," wherein the fact of said erroneous description was recited and it was further recited that the City of Denver had paid for and received a patent for certain lands, as described in said patent, and enacting, among other things, that said patent issued on November 15, 1873, be and the same thereby was approved and confirmed. (Folio 18.)

It is clear that the Congress of the United States could and did ratify and confirm the acts of its agents in making and issuing the patent in the form in which it was made and issued, and it is equally clear, as was held by the Circuit Court of Appeals, that the Congress of the United States could not, after the making of the grant, and that the act of 1890 did not operate to, annex any condition thereto or create any trust. The principle that subsequent ratification is equivalent to original authority, applies to the agents of government as well as to other agents. Since, therefore, the government officials were authorized to and did made a patent to the Mayor of the City of Denver, in trust for the city, no trust was created in favor of the inhabitants of the vicinity of said city. Moreover, this was the position taken by the plaintiff in error at the inception of his present suit, for in

his complaint it is alleged that ever since the issuance of said patent the City of Denver had been and was entitled to occupy and possess said lands so conveyed, no mention being made of those residing in the vicinity. (Folio 3.) But, even if the language of the act of 1872 is to be imported into the patent, and even if thereby a trust is created in favor of the inhabitants of the city, and also in favor of those living in the vicinity thereof (a position which we at all times combat), yet the City of Denver had full authority to accept and execute a trust of that character, and so the argument of plaintiff in error in that respect must fall to the ground. It is urged by plaintiff in error that such a trust would be a private trust, and that a municipal corporation can not administer a trust of that character for the benefit of persons residing outside of its limits, particularly when the trust property also is situated without its limits; but the trust, if trust there was, was for the inhabitants of the city as well as those of the vicinity, and the argument last mentioned is utterly destructive of the position assumed by plaintiff in error throughout the discussion, namely, that the trust, if any there was, was a trust of property for cemetery purposes, and therefore a public trust. Plaintiff in error cites certain text writers in support of his position, but the section of Dillon on Municipal Corporations (section 555) cited in this connection fails to sustain his argument, for the author there says:

> "That there are purposes for which such such a corporation may, without special

grant, purchase and hold extra territorial lands, as for a pest house, cemetery and the like objects of a municipal character."

Moreover, by the charter of the city, as it then stood, the city possessed plenary power to purchase, hold, possess and enjoy property beyond its limits for burying grounds and cemeteries (folio 17), and by many decisions of this court it has been held that a municipal corporation may take and administer a trust for purposes germane to the objects of the corporation, or which will promote, aid or assist in carrying out or perfecting those objects, and this is true although the trust property may be situated beyond the corporate limits and the *cestuis que* trustent may be other than the inhabitants of said city.

Dillon on Municipal Corporations (4th Ed.), sections 557, etc.

Vidal vs. Gerard's Executors, 2 Howard, 127.

McDonogh Will Case, 15 Howard, 367.

Perin vs. Carey, 24 Howard, 465.

Chambers vs. St. Louis, 29 Mo., 543.

And this interpretation has been placed upon the present charter of the City of Denver, which, in this respect, is practically the same as it was in 1873, by the Supreme Court of the state of Colorado.

Clayton vs. Hallett, — Colo., ——; 70 Pac., 429.

The next objection urged by plaintiff in error against the vesting of the legal title in the municipal-

ity is that while at the date of the patent the city had the right to take property for cemetery purposes outside of the corporate limits, yet Congress well knew that the legislature might at any time take away such authority. Counsel here shies at a shadow. If the municipality had authority to take such land at the time when the grant was made that is sufficient. It is idle to contend that any act of the legislature passed subsequent to such grant could divest said title or in any way impair vested rights, even should it attempt so to do. This proposition is firmly bottomed upon the elementary and unchangeable principles instilled into the mind of the student of law at the very beginning of his legal education.

The third and last reason advanced by plaintiff in error to maintain his position that the legal title could not vest in the city, is that the City of Denver had no power to hold lands outside of the city limits for purposes other than a cemetery, therefore, if Joseph E. Bates, as Mayor, took the title free from any trust except a passive one, the legal title did not and could not pass to his *cestui que trust*, the City of Denver. We must confess that we are absolutely unable to follow counsel's reasoning at this point. After giving the argument careful consideration, it seems to us and we submit that it clearly is, a most complete *non sequitur*.

By the provisions of the charter, quoted at folio 18 of the record, the city had ample power to purchase, hold, possess and enjoy real and personal property for city hall, jail, public grounds and *for other public purposes*, and to sell and convey the same, and also had power to purchase, hold, possess and enjoy real

property beyond the limits of the city for burying grounds and cemeteries. Since its power to purchase land outside the city limits for this purpose was full and complete, it mattered not in what manner the city exercised that power. If the city had purchased such lands outside its limits from a private person, could any possible question have been raised as to its authority so to do? How, then, can any such question be raised when a similar purchase for the same purpose is made by the city from the general government? And what difference does it make that the city, instead of entering and paying for the lands directly in its own name, did so through its Mayor as trustee for the municipality, such being the procedure provided for by the Congress of the United States and such being the usual procedure where a grant is made to a municipal corporation, as evidenced by the townsite grants and other grants of like nature? If the Mayor for and in behalf of the city and as its trustee entered the lands for the purpose aforesaid and paid for the same with the city's money, and if the city was authorized to purchase such lands for such purposes, by what method of reasoning can the conclusion be reached that it makes any difference in law whether the title is conveyed directly to the city by a deed or patent running to it in its corporate name or whether such title reaches it by the operation of the Statute of Uses through its Mayor, who acts as the trustee, agent and instrument of the city for that precise purpose? We submit that in the present argument counsel indulges in a refinement of reasoning which is not only beyond our ability to grasp, but which has no foundation in logic.

It might well be true and it is true that Joseph E. Bates, as Mayor, took the title to the said lands as trustee for the City of Denver and that the purpose of the City of Denver in purchasing said lands was to use them as a burial place, and nevertheless it might at the same time be true and it is true that Joseph E. Bates took merely a passive trust for said city, that he was not required by the terms of the instrument or otherwise to perform any active duties whatsoever or to do anything other than act as the instrument of the city in obtaining the title, and that neither he nor his successors have had either the possession or the right to the possession of the lands conveyed (folio 3).

But, if the Circuit Court of Appeals was altogether in error in holding that the Statute of Uses applied and that the legal title was vested in the City of Denver, yet the present plaintiff in error is in no position, and he will not be permitted, to say so. The ruling that the Statute of Uses applied was made by the Circuit Court of Appeals when this cause was first before it for consideration.

Morgan vs. Rogers, 79 Federal, 577.

The result of that decision was a reversal of the judgment of the Circuit Court and a return of the cause for a new trial. Upon said new trial plaintiff in error and his counsel acquiesced completely in said ruling of the Circuit Court of Appeals and tried said cause upon the theory that the legal title was vested in the City of Denver as a municipal corporation.

At said trial the plaintiff in error introduced the patent and then rested (folio 38). The defendants in error, on their behalf, offered in evidence the deed of

the City of Denver to Machebeuf, which is set forth at folios 27 and 28. To the introduction of this deed the plaintiff in error, by his counsel, objected for the following reasons:

1. That the City of Denver and its Mayor were without power or authority to convey the lands.

2. That there was no ordinance or resolution of the city council authorizing said conveyance; and,

3. That the deed does not conform to the recommendation of the committee, to which the matter was sent and whose report was adopted.

It will be observed that there is no objection to the deed upon the ground that the grantor named therein had no title, nor upon the ground that the title was vested in the Mayor of the City of Denver, and not in the city. The view evidently taken by counsel was that the title was in the city, but that the city was without authority to convey, and, even if it had the authority so to do, had not pursued the necessary forms (folio 39). This was the determining point of the trial, for the remaining muniments of title offered by the defendants in error were excluded upon the ground that the respective grantors had no title for the reason that they claimed to derive title from Machebeuf, the grantee in said original deed, and thereupon the jury was instructed to return a verdict for plaintiff in error. But, to make the position of plaintiff in error still more difficult in this respect, it is only necessary to refer to the proceedings in the Circuit Court of Appeals when the cause reached that court for the second time, resulting in the judgment, to reverse which the present writ of error is prosecuted. In the brief filed by the plaintiff in error in

that court upon that occasion, it is said on page 12 thereof:

> "It is respectfully submitted that no question of condition annexed to a deed is raised in this case, but that the words declaring the use to which the land should be put make a trust and confidence reposed in the City of Denver by the Congress, and that the land can not be diverted from the purpose declared without the consent of the trustor. It is true, the use declared in the patent is to the City of Denver, but the statute shows that it was not to the City of Denver in its private capacity, but to the city as a naked depository of the title to be held for the people of the City of Denver and vicinity for a burial ground. *We think it true that the Statute of Uses vested the legal title in the city*, but it was the mere legal title; the use was in the public."

Plaintiff in error could not more clearly state his acquiescence in the ruling that the statute of uses applied and that the legal title was vested in the City of Denver, nor could he, by any use of the English language with which we are familiar, more clearly state himself out of court, because, as we have shown, if the legal title became vested in the city as a municipal corporation, the Mayor of said City and his successors lost all connection with said title and could not maintain an action of ejectment, whether said City took said title as an absolute fee without condition or trust or whether it took it upon condition or in trust for uses declared.

We know of no proposition which is better settled than that the theory of the action which was adopted by the trial court or by an intermediate appellate court, with the acquiescence of the parties will govern in the final appellate court, for the purposes of review. When parties consent to the trial of their case upon a certain theory of what the law is, though it be erroneous, they can not complain of a result which is correct according to that theory, and, in order to ascertain what the theory was, the appellate court will consider the form of objections to the evidence.

Mathews vs. Mathews, 133 N. Y., 679.

The statements of counsel on the trial.

Moquist vs. Chapel, 62 Minn., 258.
Lockwood vs. Quackenbush, 83 N. Y., 607.
Oscanyan vs. Arms Co., 103 U. S., 261.

The statements in the briefs filed or arguments made on appeal.

Kenney vs. Wells, 23 Ind. App., 490.
Holman vs. Boston Land Co., 8 Colo. App., 286.

In speaking of the rule, an eminent writer says:

"The rule under discussion is no more than the application of the familiar doctrine of election, which is itself founded in the old adage that 'a man can not blow both hot and cold,' and hence there is nothing novel in it. The rule is one required by logic and prac-

tical considerations, since, without it, inconsistent positions might be assumed without any other restraint than that of the party's pleasure. But it is something more than a mere logical rule for securing consistency, inasmuch as its principal purpose is to prevent deception, since, without it, parties might mislead their adversaries by assuming one position in the trial court and another on appeal. Nor could there be an orderly administration of justice without such a rule."

Elliott on Appellate Procedure, section 496, also sections 489, 490 and 492.

In the case of Union Pacific Railroad Company vs. C., R. I. & P. Ry. Co., 163 U. S., 568, at 593, Mr. Chief Justice Fuller, in delivering the opinion of the court, stated that, in considering a case brought by appeal or writ of error to this court from the Circuit Court of Appeals, this court has to determine only, whether, in the judgment of this court, the Circuit Court of Appeals did or did not err, and affirm or reverse accordingly, and that, therefore, the judgments of the courts of appeals should not ordinarily be re-examined on a suggestion of error in that court, in that it did not hold action of the Circuit Court erroneous which was not complained of. This being true, a fortiori, the judgment of the Circuit Court of Appeals should not be reversed upon a suggestion of error in respect to a legal proposition advanced and assented to in that court by the present plaintiff in error. Certainly the Circuit Court of Appeals was

not in error in adopting the construction placed upon the grant by plaintiff in error himself, and, if its decision is correct upon the theory so assented to, such judgment can not be reversed for the reason that the legal proposition thus agreed upon was in itself erroneous. If error was committed it was so done with the consent and by the procurement of plaintiff in error.

Heimburg vs. Manhattan Ry. Co., 162 N. Y., 352.

Snyder vs. Snyder, 160 N. Y., 151.

Stapenhorst vs. Wolf, 65 N. Y., 596.

Geneva Ry. Co. vs. N. Y. Central, 163 N. Y., 228.

"When parties consent to try their case upon a certain theory of what the law is, though it be erroneous, they can not complain at the result if it be correct according to that theory."

Davis vs. Jacoby, 54 Minn., 146; 55 N. W., 908.

Detroit Motor Co. vs. Bank, 111 Mich., 417.

Graham vs. Nowlin, 54 Ind., 389.

"Counsel will not be permitted to invite error on the trial and then assign such error for the reversal of the judgment."

Guntley vs. Staed, 77 Mo. App., 155.

Douglass vs. Kansas City, 147 Mo., 428.

Rucker vs. Smelting Co., —— Colo. App., ——; 72 Pac. Rep., 682.

> "A party will not be allowed to try his case on one theory in the court below, and then, if beaten there, on ground of his own choosing, spring a fresh theory on his adversary in this court."
>
> Bray vs. Seligman, 75 Mo., 31, at 40.

When, in the lower court, plaintiff's theory is a right of recovery as assignee, he can not, on appeal, contend for a right to recover otherwise than as assignee.

> Home Insurance Co. vs. Transportation Co., 51 N. Y., 93.

Authorities upon this proposition might be multiplied indefinitely, but those cited sufficiently show that the rules we have stated above are sustained by a current of authority which, so far as our investigation has disclosed, is unruffled, and we, therefore, submit that plaintiff in error, having tried his case both in the Circuit Court of Appeals and in the Circuit Court, upon the theory that, by operation of the statute of uses the legal title vested in the City of Denver, and, having been beaten upon that theory, can not now shift his position and secure a reversal of the judgment upon the theory that the statute of uses did not so operate.

From the foregoing discussion we conclude and submit it to be established beyond question that the present plaintiff in error can not, under any circumstances, secure a reversal of the judgment of the Circuit Court of Appeals for the reason that he has not and never had any interest in the subject-matter of

the controversy; that he has not and never had either the legal title or the right to the possession, and that, therefore, he was not and could not have been prejudiced by any action of the court below, however erroneous the same may have been.

II.

THE PATENT CONVEYED AN UNQUALIFIED FEE WITHOUT CONDITION OR TRUST.

But, even if the proper party were here complaining, still the judgment below must be affirmed, for the reason that the contentions of the plaintiff in error that the grant was made either upon condition or subject to a trust of some character are without foundation. There is no question, and there can be none, that the patent conveyed the fee, nor is it anywhere contended, nor could it be successfully maintained, that the patent is void. It has been settled by the determinations of this court that a patent is to be construed and interpreted by the same rules governing other written instruments conveying title.

Brown vs. Huger, 21 Howard, 305, at 318.

Gazzan vs. Phillips, 20 Howard, 372, at 376.

Plaintiff in error cites Leavenworth Railroad vs. U. S., 92 U. S., 733, and Lake Superior Ship Canal vs. Cunningham, 155 U. S., 354, for the purpose of showing that the grant is to be construed in a sense most favorable to the grantor.

The principle is not applicable to the present case and counsel are led into the error of attempting to apply it by reason of the fact that they evidently confuse the rules applicable to the sale of the public lands made upon a valuable consideration paid therefor by the purchaser, with a free grant or donation of the public lands made without any consideration therefor whatever. The two cases last above mentioned are cases of donations of land by the general government for specific purposes and in one of them at least the grant contained an express condition subsequent, in definite and unmistakable language, with a provision that the title revert in case of misuser. These rules are absolutely inapplicable to a case such as is the one at bar, wherein the public lands have been purchased and paid for and the conveyance thereof has been made upon such valuable consideration. The rule is well settled that when a consideration is paid for the grant, the instrument of conveyance, whether it be a patent or a deed, is to be construed most strongly against the grantor, even though the grant be of the public domain and by the sovereign.

In Charles River Bridge vs. Warren Bridge, 7 Pickering, 344, it is said, citing Bacon's Abridgment, Prerog. F. 2:

> "When the king's grants are upon a valuable consideration, they shall be construed favorably to the patentee for the honor of the king."

In the same case in the United States Supreme Court (reported in 11 Peters, at 420) it is held by Mr.

Justice McLean, at page 557, that grants obtained on consideration are liberally construed in favor of the grantee, and the same rule is laid down by Mr. Justice Story at page 589, where he says that the rule of strict construction in favor of the sovereign never did apply to grants made for a valuable consideration.

In 3 Washburn on Real Property (3d Ed.), 173, the learned author says:

> "This strictness of construction in favor of the sovereign and against the subject applies only in cases where there is a real uncertainty or ambiguity in the terms of the grant, nor, as it seems, is the rule available where the grant is for a valuable consideration. In such case the rule of construction between the government and the subject is the same as between private grantors and grantees."

Applying these rules to the patent under consideration it becomes clear that the contentions of counsel can not be maintained. The act of Congress of 1872 is not and was not intended to be a grant. It is nothing more than an authorization to the officials of the land department directing them to permit a municipal corporation to enter, pay for, purchase and receive the conveyance of certain public lands.

It is perfectly clear that the language of said act: "as a burial place for said city and vicinity," was inserted for no other purpose than to assign a reason for selling public lands to a municipal corporation, a proceeding which can hardly be said to have been of every day occurrence. There can be no doubt that the

act of 1872 answered the purpose for which it was intended and conferred upon the proper officials full power to sell and convey the land described to the City of Denver. Thereupon the City of Denver, through its Mayor, entered, purchased and paid for the land and received the conveyance of the government in the form of a patent containing no limitation, restriction or burden upon the fee conveyed thereby. The land conveyed was public land, it was within the jurisdiction of the land department to convey it and the instrument executed and delivered was sufficient for that purpose. If, by inadvertence or mistake of the officials of the land department, a conveyance was made to the wrong person or of different property or of a different estate or title than was intended to be or ought to have been conveyed, the question is one which can not be raised in an action of ejectment, wherein the strict legal title prevails and equitable considerations are inadmissible.

In Bernier vs. Bernier, 147 U. S., 242, the patent ran to the minor heirs of the entryman when it should have run to all his heirs at law, both minors and adults. The court held that a decree was necessary, that the minor heirs hold the title in trust for the adult heirs in proportion to their interests.

In Brown vs. Huger, 21 Howard, 305, the patent having been made to a grantee differing in name from the maker of the original entry, it was held that in an action of ejectment no reference could be made to the steps preceding the patent, that the patent itself must be taken as evidence of its meaning and that it could not be altered by evidence aliunde, but that the legal title conveyed by the patent and derived from

the construction of the language of the patent itself must prevail in an action of ejectment.

In Gazzan vs. Phillips, 20 Howard, 372, an action in ejectment, it was held that the rights of the parties must be controlled by the language of the patent and resort can not be had to any supposed original equity arising under the pre-emption laws, the court saying, on page 376:

> "We deny altogether the right of the court in this action to go beyond these terms, thus explicit and specific, and under a supposed equity in favor of Etheridge, arising out of the pre-emption laws, to the whole of the southwest quarter, enlarge the description in the grant, or, more accurately speaking, determine the tract and quantity of the land granted by this supposed equity instead of by the description in the patent."

If it be true that, in an action of ejectment, the court will not go outside the patent to enlarge the premises or the title conveyed, by the same reasoning must it be true that the court will not go outside the patent for the purpose of diminishing either the premises or the quality of the title conveyed.

In Niles vs. Cedar Point Club, 175 U. S., 300, Mr. Justice Brewer held, on page 308, that although the land might be of such character that it should have passed to the state of Ohio under the swamp land act, neverthless the land department treated it as land subject to its control as public land of the United States, and had it surveyed, sold and patented, and

that the legal title passed to the patentee and to his grantees.

The dignity, importance and practical unassailability, even in an action in equity, of a patent of the United States is demonstrated by frequent decisions of this court.

Colo. Coal Co. vs. U. S., 123 U. S., 307.
U. S. vs. Northern Pacific, 95 Fed., 864.
U. S. vs. Northern Pacific, 177 U. S., 435.

And it has always been held that a patent carries the fee, and is the best title known to a court of law.

Gibson vs. Chouteau, 13 Wallace, 92.
Johnson vs. Towsley, 13 Wallace, 72.
Cooper vs. Scheimer, 23 Howard, 235.
Cowell vs. Springs Co., 100 U. S., 55.
Smelting Co. vs. Kemp, 104 U. S., 636.

Even if it could be successfully maintained (which it can not) that the land department did not comply strictly with the authority conferred by the act of 1872, in that said department sold and conveyed an unqualified fee thereof, yet such contention is now quite unavailing, for the reason that the act of the land department in that regard was subsequently and before the bringing of this suit fully ratified and confirmed. That the language of the act of 1890 was sufficient for that purpose is evident without discussion (folio 18); that it had such effect can not be doubted.

U. S. vs. Des Moines River Navigation Co.,
43 Fed., 1.

That it could and did have no effect beyond the confirmation of the conveyance, both in respect to the description of the land and also in respect to the quality of the estate conveyed, can not be doubted, and it is equally clear that said act of 1890 could not, and did not, operate to annex any condition to the grant already made.

The land involved in the present action was no part of that, the description of which it was necessary to correct, but the tract involved in the case at bar was correctly described in the original act and in the original patent.

The United States, having made a grant of an unqualified fee in the first instance, could not, after the lapse of a great number of years, and certainly not after the intervention of the rights of innocent purchasers such as Machebeuf, Morgan and their grantees are, change the grant, merely by an act of its legislative department, to one upon condition or in trust.

The cases heretofore cited sufficiently demonstrate that, by the patent, the government parted with its title to the land. It is clear, therefore, that in this case the question arises between the alleged grantee of the city and the city itself, and that from the date of the patent, November 15, 1873, the government has had no interest, and, however this question may now be decided, the government would have no interest in the property. It must go either to the plaintiff or defendants in this case, without any further compensation to the government.

The case thus carries with it the decision of the Supreme Court of the United States, in U. S. vs. San Jacinto Tin Co., 125 U. S., 273, wherein it was held that the government in such a case had no interest in

the matter, and could not bring suit to set aside a patent to the lands, once issued, for want of a sufficient interest. Now, if that be true, then *a fortiori* must it be true that the legislative department could not, on the same ground and for the same reason, legislate the land out of one party into another. If the patent was good when issued, no subsequent act of Congress could make it bad, much less take away the rights acquired by an innocent purchaser in good faith by purchase from the city or its grantee.

U. S. vs. Minor, 114 U. S., 233.

In Moore vs. Robins, 96 U. S., 530, it is held that, after a patent is issued and accepted by the grantee, all control, even by the executive department, ceases, and that such patent passes the legal title to the grantee.

To the same effect are:

Widdicombe vs. Childers, 124 U. S., 401, at 405.

Smelting Co. vs. Kemp, 104 U. S., 636, at 647.

Nor do the words "in trust," in the patent, reserve any right to the government or give it any control over the property. That point was expressly decided in Cowell vs. Colorado Springs, 100 U. S., 55. Such being the law, it is clear that the rights of the defendants herein are not in any measure diminished by the act of Congress of January, 1890.

Mead vs. Ballard, 7 Wallace, 290.

Tex. Ry. vs. Marshall, 136 U. S., 393, 403.

Berkley vs. U. P., 33 Fed., 794.

Iron Co. vs. Erie, 41 Pa. St., 341.

But, even if the words "as a burial place for said city and vicinity" could be imported into the patent, and even if the patent must be read as though said words were incorporated therein, yet it is clear that these words simply declare the purpose or occasion of the grant, and have not the effect of qualifying or limiting the estate in fee expressly granted by the patent, or attaching thereto any conditions or burdens whatsoever. There can be no doubt that the city was fully authorized by its charter to acquire lands beyond the city limits by purchase or otherwise for burying grounds and cemeteries, and it is equally clear that, having acquired such lands, the city was also authorized to sell and convey the same, particularly when it had never taken possession thereof, had never made use of the same, either for a burying ground or for any purpose, and when, as to the particular ground in controversy here, no interments had been, or ever were, made therein, either by the authority of the city or otherwise.

Section 4 of the charter, as it then stood, provided that the city should have power and authority to purchase, hold, possess and enjoy both real and personal property for city hall, jail, public grounds and *for other public purposes*, and should have power and authority to sell and convey the same, and might also purchase, hold, possess and enjoy real property beyond the limits of said city for burying grounds and cemeteries and improve the same. And section 5 of the charter further provided that said city should have power and authority, and was thereby empowered and authorized to take, hold, possess, use and enjoy both real and personal property by deed, grant, gift, be-

quest, devise or otherwise, and that it should have the power through and by the city council to sell and convey the same for the sole use and benefit of the inhabitants of said city. (Folio 17.)

Some argument is attempted to be made that the city had not the power to alienate lands acquired for cemetery purposes, for the reason that the language giving the power of alienation, although used in the same section, was not placed in immediate juxtaposition with the words granting the power to acquire lands for cemetery purposes; but it is ridiculous to suppose that the legislature intended to make any distinction between lands acquired for cemetery purposes and lands acquired for other public purposes in respect to the power of alienation. It might very well be true, and in the present case it is true, that the city, having acquired lands for cemetery purposes, might find them unavailable for that purpose, or might discover that it had purchased more land than was required for that purpose, or might determine that some site other than the one purchased was better adapted for the purposes of a cemetery. In such event could it be maintained with any show of reason that the city had not the power to dispose of the lands already acquired, in order that the newly arisen conditions above mentioned might be met? We submit it to be clearly the intention of the legislature, when it gave the city power to dispose of lands acquired for "other public purposes," to include therein lands acquired for cemetery purposes.

An *argumentum ad hominem* is attempted to be built up, based upon the premise that neither the legislature of the state nor the Congress of the United

States intended to permit the city to alienate the lands conveyed for cemetery purposes, because a burial place is God's acre, and the alienation of the lands would result in the desecration of the graves, but this argument is wholly inapplicable to the case at bar, for the reason that the city never took possession of the tract which it conveyed to Machebeuf; no interments were ever made therein by the authority of the city, and for the further reason that, of the forty acres conveyed to Machebeuf, twenty acres thereof had been used for many years prior to the said conveyance as a burial place for members of the Catholic church, of which Machebeuf was bishop, and continued to be so used for many years after the conveyance, until about the year 1887, when burials therein were forbidden, and that, as to the other twenty acres, which constitute the land involved in the present controversy, no interments of any character were ever made therein, either under the authority of the Catholic church or under the authority of the City of Denver, or at all.

The city purchased this land for cemetery purposes, but found it unavailable for that purpose for the reason that Machebeuf, representing the Catholic church, had prior rights thereto as a burial place for members of said church, such rights dating back as far as the year 1863. For this reason the rights of the city therein were relinquished and conveyed to Machebeuf upon his paying therefor a consideration of not less than fifty dollars ($50) and probably all of the expenses to which the City of Denver had been put in obtaining government title. (Folios 14, 15 and 16.)

The right and power of the City of Denver to make this conveyance is fully established by the provisions of its charter above quoted. The fact that the power to alienate is not expressed in immediate conjunction with the power to acquire lands for cemetery purposes is of no significance. What is implied in a statute is as much a part of it as what is expressed.

> Thurber vs. Miller, 67 Federal, 371, at 376.
>
> U. S. vs. Babbit, 1 Black, 61.
>
> Gelpcke vs. Dubuque, 1 Wallace, 221.
>
> Wilson Co. vs. Third National Bank, 103 U. S., 770.

Even if the language employed in the act of 1872 had been incorporated into the patent, it is thoroughly well settled that nevertheless the patent would have conveyed an unqualified fee, without condition, limitation, covenant or trust.

In the case of Stuart vs. Easton, 170 U. S., 383, this court had under consideration a patent to lands, the language of which was in substance:

> "in trust, nevertheless, to and for the erection thereon of a court house for the public use and service of the said county, and to and for no other use, intent or purpose whatsoever."

It will be immediately perceived that this language is much more stringent and specific than the language in the case at bar, yet this court held that the estate conveyed was an unqualified fee, without

condition or limitation, and in the discussion of the subject Mr. Justice White cited with approval, among many other cases, the case of Slegel vs. Lauer, 148 Pa. St., 236, wherein it was said:

> "Of course the mere expression of a purpose will not of and by itself debase a fee."

Also, the case of Kerlin vs. Campbell, 15 Pa. St., 500, wherein a grant in fee simple, to the county commissioners, of land "for the use of the inhabitants of Delaware county, to accommodate the public service of the county," was held not to create a base fee.

Also, the case of Seebold vs. Shitler, 34 Pa. St., 133, in which it was held that a grant to the county commissioners and their successors in office of a tract of land, with a brick court house thereon erected, "in trust for the use of said county in fee simple," conveyed an unqualified fee.

Also, the case of Packard vs. Ames, 16 Gray, 327, wherein it was said:

> "We know of no authority by which a grant declared to be for a special purpose, without other words, can be held to be upon condition."

In Commissioners vs. Young, 59 Fed., 96, the Circuit Court of Appeals for the sixth circuit announced it to be a rule supported by an overwhelming weight of authority that the mere expression of a purpose, or a particular use to which property is to be appropriated, will not make the estate a conditional one,

and on page 105 a large number of cases are cited to sustain the conclusion.

To the same effect are:

Rawson vs. School District, 7 Allen, 125.

Portland vs. Terwilliger, 16 Ore., 465; 19 Pac. Rep., 90.

Stone vs. Houghton, 139 Mass., 175.

Ayer vs. Emery, 14 Allen, 67.

Sohier vs. Trinity Church, 109 Mass., 1.

Episcopal Mission vs. Appleton, 117 Mass., 326.

Farnham vs. Thompson, 34 Minn., 330.

Taylor vs. Binford, 37 Ohio St., 262.

Carter vs. Braun, 79 Ind., 14.

Brown vs. Caldwell, 23 W. Va., 187.

Thornton vs. Trammell, 39 Ga., 202.

From these authorities it follows, also, that there was no dedication of the property to the public use in such sense as to render the property inalienable by the City of Denver; for, to permit the grant so to operate, would be to impose a burden upon the fee, to attach thereto a qualification, and in the cases above cited it is held by the various courts, including this court, that similar and even stronger language contained in the grant will not be permitted to qualify the fee in any respect.

Under the facts appearing in the case at bar, it is impossible to hold that there was a dedication. The primary idea of a dedication is that there is a gift or donation upon the part of the dedicator. It is clear,

therefore, that there was no dedication by the United States in making this grant, for the reason that the grant was not a donation, but was a sale of the property at the usual government price. It is contended by counsel that there was to some extent a donation for the reason that the government exacted the minimum price, whereas it might have had the maximum price, because the lands were within the place limits of a certain railroad grant. It is to be observed that counsel travels completely outside of the record in making this statement, but, even if it were true, it would have no effect upon the principle which we have invoked, for the reason that, in such cases, the inquiry is not whether the consideration paid was fuly adequate, but whether the grant was made by the dedicator as a pure donation, gift or gratuity.

The subject is fully discussed in Commissioners vs. Young, herein above cited, and in many other cases cited herein in this connection.

That there was no dedication is also evident for another reason, which is that the use of the property involved in the present controversy as a public cemetery was never, at any time, accepted, either by the City of Denver or by the inhabitants of said city or its vicinity. It is thoroughly well settled that a dedication does not take effect until there has been an acceptance of the use by the public, and in the present case not only is there no evidence of an acceptance of the use, but, on the contrary, the undisputed facts completely negative any such acceptance. As to the forty-acre tract conveyed to Machebeuf, of which the property in controversy is a part, it appears that it was never, at any time, either before or after the government patent, used as a public cemetery. Only a

part thereof, and that not the part involved in this suit, was used as a cemetery at all, and it was used, not by the public generally, but only by the Catholic church. Neither the city nor the general public ever, at any time, took possession of the tract, or any part thereof; but since 1863 and up to the time of the conveyance to Morgan in 1887, the possession was in Machebeuf for the Catholic church. The City of Denver recognized the prior rights of Machebeuf and almost immediately after receiving the patent, and without in any way attempting to take possession of the tract, conveyed whatever right to the property it had acquired by deed to Machebeuf and, during the entire period, the tract was used, not by the public, but by Machebeuf and the Catholic church, as a place of interment for the members of said church and not as a burial place for the public generally, and this use continued until, first by public clamor and afterwards by ordinance and by orders of the board of health, burials in that place were forbidden by the City of Denver, whereupon Machebeuf conveyed the property here in controversy to Morgan. It, therefore, appears, not only that the city and its inhabitants never took possession of the tract, or used it for a cemetery, but that, before they had ever done so, the city conveyed it away and thereafter and also before such use had ever been begun, the city, by ordinance, forbade burials in that place. It would be difficult to imagine more conclusive evidence of a refusal to accept the dedication, even if any dedication had been attempted.

Town vs. Trust Co. (Colo. Sup.), 70 Pac., 763.

Pettit vs. Mayor (Ga.), 23 S. E., 198.

But no dedication was attempted or intended, and the patent did not so operate. This is settled by an overwhelming weight of authority, and it is also well settled that a municipal corporation having acquired title under similar circumstances, is at liberty to alienate the same, and especially so under such facts as are presented in the case at bar.

In Van Ness vs. City of Washington, 4 Peters, 232, this court had under consideration the grants by the original proprietors of portions of the territory now constituting the city of Washington and the District of Columbia. It appeared that, by the contract with the original proprietors, they agreed to convey in trust to the president of the United States or commissioners or such persons as he should appoint, the title to their respective lands; that the president should have the sole power of directing the Federal City to be laid off in what manner he pleased, retaining any number of squares he might think proper for public improvements *or other public uses.* When the city was laid off the lots were to be the joint property of the trustees of the original proprietors and the moneys received for their sale to be thus divided. For the streets of the city the proprietors were to receive no compensation, but for the squares or lots taken for public buildings or other public uses the proprietors were to receive compensation at the rate of twenty-five pounds per acre. It was contended by the complainants that the lands designated by the president under the agreement as public reserves were clothed with a perpetual condition or trust that they should ever remain public reserves and could not be appropriated to any private use or changed from their original public

purposes; in other words, that a dedication had been made thereof to the public use and that they were held in trust for that purpose. Mr. Justice Story, who delivered the opinion of the court, answered these contentions in a most luminous and convincing opinion, holding that the city of Washington was at liberty to alienate portions of the property reserved by the president as public squares for public purposes. Referring to the contention that the property had been dedicated to the public use or was conveyed in trust for such public use, he says, on page 280:

> "It is not a mere gratuitous donation, from motives of generosity or public spirit. * * * * * They were to receive twenty-five pounds per acre for the public reserves. They understood themselves, then, to receive payment from the public for the reserves. It makes no difference that, by the subsequent arrangements, they were to receive this payment out of the sales of the lots, which they had agreed to convey to the public in consideration of the government's founding the city on their lands. It was still contemplated by them as a compensation, as a valuable consideration fully adequate to all their grants. It can, therefore, be treated in no other manner than as a bargain between themselves and the government for what each deemed an adequate consideration. Neither considered it a case where all was benefit on one side and all sacrifice on the other. It was in no just sense a case of charity and was never so treated in the negotiations of the parties."

At another place in the opinion (page 282) he says that, although the case stood solely upon said preparatory agreement:

> "Even then the appropriation of these squares for public uses would not necessarily carry with it an implied obligation that they should forever remain dedicated to those uses and to none other. If such had been the intention of the parties, we should naturally expect to find there some direct expression of it, some acknowledgement of the obligation or some condition carrying it to such a political mortmain. If the stipulation was so important and valuable as is now contended for and constituted an object of permanent solicitude, it would scarcely escape the notice of the proprietors in laying down the fundamental basis of their cessions."

Mr. Justice Story emphasizes his conclusions by a reference to deeds which were subsequently made by the proprietors in pursuance of the contract, to the trustees selected by the president, which deeds provided that said trustees should convey to commissioners appointed for that purpose, the streets and public places selected by the president "for the use of the United States forever."

These deeds correspond to the patent in the present case and the preliminary contract to the act of Congress of 1872.

Referring to the deeds, Mr. Justice Story holds that they must be construed to embody the final agreement of the parties:

> **"There is no pretense to say that the indenture has not fully carried that agreement into effect. There is no allegation in the bill of any mistake in the draft of the indenture, or that the instrument was not precisely what the parties intended it should be. * * * We must take the indenture, therefore, as we find it, as the complete execution of the preliminary agreement, and as expressing the true intent and definitive objects of the parties. The preliminary agreement then became, upon the execution of the indenture, *functus officio*, and was merged in the more formal and solemn stipulations of the latter. * * * Here we have a solemn instrument embodying the final intentions and agreements of the parties, without any allegation of mistake, and we are to construe that instrument according to the legal import of its terms. Now, upon such legal import there do not seem grounds for any reasonable doubt. The streets and public squares are declared to be conveyed 'for the use of the United States forever.' These are the very words which, by law, are required to vest an absolute unconditional fee simple in the United States. They are the appropriate terms of art, if we may so say, to express an unlimited use in the government. If the government were to purchase a lot of land for**

> any general purpose, they are the very words which the conveyance would adopt in order to grant an unlimited fee to the use of the government. There are no other words or references in the instrument which control in any manner the natural meaning of them. There are no objects avowed upon the face of it which imply any limitation. How, then, can the court defeat the real meaning and resort to a conjectural intent?"

In Potomac Steamoat Co. vs. Upper Potomac Co., 109 U. S., 672, this court again had under consideration the same contracts and the same grants, and the reasoning and conclusions of Mr. Justice Story were reaffirmed and adopted.

The same course of reasoning was followed and similar conclusions reached under analogous facts by the Circuit Court of Appeals of the Sixth Circuit in Board of Commissioners vs. Young, 59 Fed., 96.

In Brendle vs. German Reform Church, 33 Pa. St., 415, a case approved by this court in Stuart vs. Easton (supra), it was held that a conveyance of land to trustees in trust for the use of a religious congregation for the benefit of its poor, for a place to erect a church and *for a burial ground*, vests an executed legal estate in the congregation itself, not by way of charitable use, but in absolute ownership, and the congregation may sell and alienate the same if it so desire, thereby conveying a good title.

In Beach vs. Haynes, 12 Vermont, 15, Judge Redfield held that when land was conveyed to a town by a deed reciting that it was "for the use of a common,"

there was no dedication, but the town took an unqualified fee and might convey the same; and the same ruling was made in State vs. Woodward, 23 Vermont, 92.

In Supervisors vs. Patterson, 56 Ill., 111, both in the agreement of sale and in the deed it was provided that the land was sold and conveyed "for a court house and other county buildings." It was held that these words did not operate in anywise to restrain the power of alienation by the proper county authorities, the court saying:

> "If A. buys a lot of ground from B. and it is declared in the deed that he purchased it as a site for a mill or other operative establishment, the fee being conveyed to him, he has the undoubted right to dispose of it without carrying out his intention."

In Pettit vs. Mayor, 95 Ga., 645; 23 S. E., 198, it is held that, even where the city itself had appropriated and set aside certain real estate, the title to which stood in the municipal corporation, for cemetery purposes, yet such appropriation did not constitute an irrevocable dedication, unless there was upon the part of the public such user thereof for that purpose that a change in use would operate as a serious injury or inconvenience to the general public.

We have already called attention to the fact that the property in controversy here was never used by any one as a cemetery, and no interments were ever made therein, and that, of the entire forty acres conveyed to Machebeuf, only a part thereof was so used,

and such use was not by the public generally, but by the members of a certain religious society.

This brings the case within the rule laid down in Ogden vs. Bear Lake Co., 16 Utah, 440; 52 Pac., 697, wherein the court, stating in apt language the well settled principle, said:

> "A city sometimes has on hand personal and real property not devoted to the use of the public. Fire engines, horses or other personal property may become unsuited to the use for which they were designed and be replaced and cease to be used. Public buildings may become unfit for the public use, and for sufficient reasons the city may not wish to build on the same lot, and such buildings and the lots upon which they stand may be no longer used by the public. The city, from time to time, may have other classes of property that has ceased to be used or is not used by the public. All such property of a municipal corporation not devoted to the public use may be sold or leased under the general authority to sell or lease as the public welfare may demand. Such property may be converted into money or other things, and in that form devoted to the use of the public."

To the same effect are:

U. S. vs. Case Library, 98 Fed., 512.
Konrad vs. Rogers, 70 Wis., 492.
Christy vs. Whitmore, 67 Iowa, 60.
Bushnell vs. Whitlock, 77 Iowa, 285.

Town of Prestonsburg vs. Floyd County, 23 Ky. Law Rep., 1157; 64 S. W., 907.

Llano County vs. Knowles, —— Texas Civil Appeals, ——; 29 S. W., 549.

Attorney General vs. Merrimac Co., 14 Gray, 586.

Town vs. Elliott, 5 Ohio St., 114.

De Varaigne vs. Fox, 2 Blatchford, 95.

Brooklyn vs. Armstrong, 45 N. Y., 234, at 243.

McGehee vs. Woodville, 59 Miss., 648.

Field vs. Providence, 17 Rhode Island, 803.

First German Church vs. Summit County Commissioners, 23 Ohio Circuit Court Reports, 553.

A number of cases are cited and quoted from in plaintiff in error's brief, supposed to sustain the contention that the property in controversy had been dedicated to the public use as a public cemetery for the inhabitants of the City of Denver and vicinity. It would serve no useful purpose to take up and criticise these cases separately. Suffice it to say that not a single case so cited supports the contention. Without an exception, the cases involved a donation and not a sale of the property, and thus were controlled by the doctrine of charitable uses. Most, if not all, of them arose upon common law dedications, which operated by way of estoppel and by which the grantee receives only an easement, the legal estate always remaining in the grantor, and consequently the grantee has nothing to convey, and in all of said cases the

intention to dedicate is expressed in unequivocal language, and the dedication had been accepted by the public and the property taken possession of and used for the purpose intended by the dedicator. The distinction between such cases and the case at bar is too clear to need further comment. Furthermore, almost without exception the cases cited were actions in equity brought by the dedicator or grantor for the purpose of controlling the use and preventing the misuser of the property. No case was such as is the one at bar, of the nature of an action in ejectment, which is to be determined upon the strict legal title.

At least one of the cases cited, and that, perhaps, the strongest of them all, was subsequently reversed. We refer to the case of Stockton vs. Newark, 42 N. J. Eq., 531, which was reversed in Newark vs. Stockton, 44 N. J. Eq., 179.

But, even if there were either a condition subsequent or a trust, the act of Congress of 1890 rendered the fulfillment of the condition unnecessary, and the action of the city council in forbidding burials in the premises in controversy rendered the performance of the trust impossible. This of itself would do away with any right of reversion, either to the city or to the United States, and would deprive either of them of any further control of the property.

Jerome vs. Railroad, 14 W. Va., 514.

Elkhart vs. Ellis, 113 Ind., 215.

Taken in connection with the deed of the city, which absolutely transferred all the interest of the city in the land in controversy, there is no escape from the conclusion that the City of Denver, as a municipal

corporation, is wholly precluded from maintaining any of the positions assumed in this litigation.

Schlessinger vs. Mallard, 70 Cal., 326.

But, if the estate were one conveyed upon condition, no one could take advantage of the violation of that condition except the United States government, and it could do so only by some affirmative act.

Van Wyck vs. Knevals, 106 U. S., 360.

Bybee vs. Oregon Co., 139 U. S., 663.

U. S. vs. Loughrey, 172 U. S., 206.

U. S. vs. Tennessee Co., 176 U. S., 242.

Northern Pacific vs. Smith, 171 U. S., 275.

2 Devlin on Deeds, section 969.

Or, if the grant be viewed as one in trust, yet the conveyance of the trustee in violation of the terms of the trust nevertheless carries the legal title. No complaint thereof can be made by any except the *cestui que trust*, and then only by an action in equity and not in a suit at law.

Williams vs. Jackson, 107 U. S., 478.

Cowell vs. Colorado Springs Co., 100 U. S., 555.

Clayton vs. Spencer, 2 Colo., 378.

Smith vs. Pipe, 3 Colo., 187, at 195.

Fillmore vs. Reithman, 6 Colo., 120.

Murray vs. Hobson, 10 Colo., 66.

Stephens vs. Clay, 17 Colo., 489.

Reid vs. Sullivan, 20 Colo., 498.

Town vs. Meyers, 16 Vermont, 408.

If there be a trust for a public purpose, the City of Denver, as a municipal corporation, was not the *cestui que trust*, but, by the contention of plaintiff in error, the inhabitants of said city and vicinity; in other words, the general public were the *cestuisque trustent*, as is invariably true in cases of dedication for a public use; but, if the city, as a municipal corporation, were the *cestui que trust*, it can not now complain, for it parted with its interest by deed.

III.

LACHES AND EQUITABLE ESTOPPEL.

But, even if there had been, at any time, cause for complaint upon the grounds stated in plaintiff in error's argument, and, even if the proper party were here complaining, still the judgment below should be affirmed for the reason that the city and its representatives were clearly estopped by their own conduct and delay from disturbing the title which had been conveyed to Machebeuf and which passed from him to his grantees, now parties to this suit.

It appears, without dispute, that as early as 1863 the forty acres were in the possession of one Walley, and the title thereto was claimed by him; that at that time it was purchased from Walley by Machebeuf for the sum of two hundred dollars ($200); that, thereupon, Machebeuf took possession of the property and maintained the possession thereof until he sold it to Morgan; that when the patent of the United States was issued to the City of Denver, neither said city nor

any one in its behalf attempted to take possession of the property, but such proceedings were had by the city council that it was determined that Machebeuf had prior rights to the property, and thereupon it was resolved to convey any rights which the City of Denver had to Machebeuf upon the payment of $1.25 an acre and the costs of obtaining the patent; that thereupon Machebeuf paid the city not less than $50.00, and probably more, and received the city's deed; that the city and its representatives stood by from February 6, 1874, the date of said deed, until September 1, 1892, when this action was begun, and, with full knowledge, permitted Machebeuf to use said premises as a private cemetery for members of the Catholic faith, permitted him, on May 2, 1887, to convey said property, or part of it, to The Colorado Catholic Loan and Trust Company, allowed its use as a private cemetery to be continued until some time in the year 1887, when interments therein ceased because of the public clamor in regard thereto, the City of Denver having extended and surrounded said tract, and subsequently and before the bringing of this action, having by ordinance forbidden such interments. The city and its representatives remained inactive while said property, by the lapse of time and the growth of said city was converted from land of comparatively little value to town lots of very great value; while, after interments had ceased, as aforesaid, Machebeuf and the Colorado Catholic Loan and Trust Company sold, for a large sum of money, to Samuel B. Morgan, that portion of the property in which no interments had been made; while the said Morgan platted the land as a part of the City of Denver, dedicating the streets and alleys

to the public and filing the plats in the county recorder's office; while the said Morgan placed said property upon the market and sold large numbers of said lots to various persons, now made defendants to this action, and not only remained inactive as aforesaid and raised no objection while all of the things above mentioned were being done, but, after the platting of said property and the dedication of the streets and alleys, for four years levied taxes thereon, to the amount of nearly $2,500, which Morgan paid, while Morgan, who had himself bought in good faith and without notice of any defect in his deed, was selling and conveying portions of the land to many others likewise buying in good faith.

We submit that the facts above recited, taken in connection with the fact that the city has never offered to return either the purchase price received by it from Machebeuf or any of the taxes arising from the assessment of the property for the purpose of taxation, make such a case of equitable estoppel and the delay of the city for a period of eighteen years to question in any way the validity of the title conveyed by its deed constitutes such laches that, even in a court of equity, relief would be denied it, and certainly it can have no such relief in a court of law, where only the legal title is considered.

The doctrine of equitable estoppel is applicable both to matters arising in suits at law as well as in equity, and the doctrine has been applied in many cases in the federal courts.

Dickerson vs. Colgrove, 100 U. S., 580.

Baker vs. Humphrey, 101 U. S., 494, at 499.

In Kirk vs. Hamilton, 102 U. S., 78, the court refers to the reason why such an estoppel is applicable to a suit in ejectment, saying that it is because such a suit involves both the right of property and the right of possession; that, as the facts show that *in equity* and good conscience the plaintiff was not entitled to disturb defendant's possession, there is no reason why the defendants might not rely on the doctrine of equitable estoppel.

So, in George vs. Tate, 102 U. S., 570, where title by estoppel is claimed and the doctrine, as to its use in suits at law, is affirmed.

See, also:

Drexell vs. Berny, 122 U. S., 253.

Miller vs. Merine, 43 Fed., 266.

DeGuire vs. St. Joseph Lead Co., 38 Fed., 65, at 66.

In Kirk vs. Hamilton (supra) a party claiming under a judicial sale was allowed to hold a title, though not a valid title, as against the real owner of the property, who stood by and allowed the purchaser to expend money on the strength of such title, the court saying:

> "He was silent when good faith required him to put the purchaser on guard. He should not now be heard to say that that is not true which his conduct unmistakably declared was true, and upon the faith of which the others acted."

And in George vs. Tate (supra) the court says:

> "A title to real estate thus acquired is effectual either for attack or defense in an action of ejectment."

The mere act of levying taxes and assessing the lots to Morgan is enough in and of itself alone to establish an estoppel as against the city's claim that he did not own it, but that it was public property.

Dillon on Municipal Corporations (3d Ed.), section 674.

Simplot vs. Dubuque, 49 Iowa, 632.

Quincy vs. Railroad, 92 Ill., 21.

Adams County vs. Railroad, 39 Iowa, 511.

Brandirff vs. Harrison County, 50 Iowa, 164.

Smith vs. City, 80 Iowa, 85, at 89.

County vs. Am. Co., 40 Iowa, 460.

Austin vs. Bremer County, 44 Iowa, 156.

C. & N. W. vs. People, 91 Ill., 251, at 255.

Taken in connection with the other facts which appear in this case without dispute, we submit that an equitable estoppel is established beyond all question.

In U. P. R. R. Co. vs. McAlpine, 129 U. S., 314, the court says:

> "A principle of common justice forbids that one shall be permitted to lead another to act upon a contract of purchase with him and incur expenses by reason of it, and then, upon some pretext of a defect in a matter of

> form, refuse compliance with its provisions, and thus deprive the purchaser of the benefits of his labor and expenditures."

An equitable estoppel is as available against and laches is as well imputed to a municipal corporation as to an individual. This court, in Boone County vs. The Burlington Co., 139 U. S., 684, says:

> "The principle of ratification by laches or delay is as applicable to such a municipal corporation as it is to a private corporation or an individual person."

And in the above case the court cites Railroad Co. vs. District of Columbia, 132 U. S., 1, 11 and 12.

See, also:

1 Dillon on Municipal Corporations (4th Ed.), section 548.

Clark vs. City of Washington, 12 Wheaton, 40.

School District vs. Goerges, 50 Mo., 194.

The rule is thus laid down by this court in Zabriskie vs. Railroad Company, 23 Howard, 381, at 400:

> "A corporation, quite as much as an individual, is held to a careful adherence to the truth in its dealings with mankind, and can not by its representations or silence involve others in onerous engagements, and then defeat the calculations and plans its own conduct has superinduced."

Several matters were assigned as error which have not been discussed in plaintiff in error's brief. Relying upon the settled rule that this court will not consider errors assigned but not discussed, we pass them by.

Home Benefit Association vs. Sargent, 142 U. S., 691, at 694.

Van Guirden vs. Va. Coal & Iron Co., 8 U. S. App., 229; 52 Fed., 838.

American Fiber Co. vs. Buckskin Fiber Co., 37 U. S. App., 742; 72 Fed., 508.

Upon the arguments advanced and the authorities cited in the foregoing pages, we submit the cause, respectfully confident that the result must be an affirmance of the judgment of the Circuit Court of Appeals.

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